(1)

Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

AVON PRODUCTS, INC.,

Petitioner,

v.

JOHN BYRNE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Avon fired respondent Byrne, a previously satisfactory employee, for misusing company time after discovering that he had been repeatedly leaving his critical post to sleep or read on the job. Unknown to Avon at the time was that Byrne was suffering from a severe, undiagnosed depression which affected his sleep and his work, and may have prevented him from requesting FMLA leave before his discharge.

The questions presented are:

1. Whether an employee's changed behavior, manifested only as a form of workplace misconduct, can constitute notice from the employee of the need for FMLA leave.

2. Whether an employee, unable for medical reasons unknown to his employer to give notice of his need for FMLA leave, is excused from providing such notice under 29 C.F.R. § 825.303(a).

PARTIES TO THE PROCEEDING

The only parties to the proceeding are identified in the caption.

Avon Products, Inc. has no parent company, and no publicly held corporation owns ten percent or more of its stock.

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Petitioner, Avon Products, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-7a) is reported at 328 F.3d 379. The opinion of the District Court (Pet. App. 8a-26a) is not reported.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was issued on May 9, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 2601 provides, in relevant part:

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers. . . .

29 U.S.C. § 2612 provides, in relevant part:

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period for one or more of the following:

> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(e) Foreseeable leave

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment, the employee –

> (B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

29 U.S.C. § 2614 provides, in relevant part:

(a) Restoration to position

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to –

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave.

29 C.F.R. § 825.303 provides, in relevant part:

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

STATEMENT OF THE CASE

A. District Court Jurisdiction

The jurisdiction of the District Court was invoked under Section 2617(a)(2) of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.* ("FMLA") and Section 12117 of the Americans with Disabilities Act, 29 U.S.C. § 12101, *et seq.* ("ADA") (incorporating by reference 42 U.S.C. § 2000e-5(f)(3)).[1]

B. Material Facts

Avon is a global manufacturer and distributor of beauty products with a production and distribution facility in Morton Grove, Illinois. Byrne was employed as Avon's sole third-shift stationary engineer (10:00 p.m. to 6:00 a.m.) to monitor and maintain the facility's steam system. The job is critical because steam is integral to the running of plant equipment and machinery. Until the events which gave rise to his discharge, Byrne was considered a satisfactory employee. (Pet. App. 1a, 10a).

On November 7, 1998, Byrne was found sleeping in the facility's carpenter's shop, a restricted area accessible only by security card and located well away from the boiler room, which was Byrne's assigned work area (Pet. App. 1a, 10a-11a). A subsequent review of security logs revealed that Byrne had been entering the carpenter's shop repeatedly since October 26, often two or three times a shift (Pet. App. 11a).

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1. Avon is not requesting review of the Court of Appeals' affirmance of the District Court's disposition of Byrne's ADA claim.

Concerned that Byrne was misusing Company time, Avon installed a video camera in the carpenter's shop to monitor his activities. The camera recorded Byrne reading and sleeping for about three hours during his November 11-12 shift and for nearly five hours during his November 12-13 shift (Pet. App. 12a).

After reviewing the video tapes with a human resources manager, Byrne's immediate supervisors decided to meet with him during his next scheduled shift on November 16. Before they could, Byrne went home leaving a voicemail message that he was "sick" or "not feeling well" and would not be at work for the rest of the week (Pet. App. 2a, 13a).

James Sparks, Avon's facilities engineer, called Byrne at his sister's home during the early morning of November 17 to find out why he was not at work (Pet. App. 13a-14a). Byrne's sister informed Sparks that her brother was vomiting and too ill to come to the phone. Additional calls elicited no information beyond that Byrne was still ill and that his family was attempting to coax him into seeing a doctor. Later that afternoon, Sparks reached Byrne and asked him to return to the plant for a meeting. Byrne agreed and his sister said she would drive him to the plant.

Byrne never showed up for the meeting and never called. Nor did his sister call. His sister drove him instead to a hospital where he was examined in the emergency room and admitted for further evaluation (Pet. App. 15a). Not knowing why he had failed to appear, Byrne's supervisors discharged him for misuse of Company time (Pet. App. 2a, 15a-16a).

Tne following morning, Byrne's sister advised Avon that Byrne had been hospitalized, but did not disclose why. Three weeks later Avon learned for the first time from a treating psychiatrist that he had diagnosed Byrne as suffering from severe depression that had affected his work, and that Byrne was undergoing treatment (Pet. App. 21a; R. 16, Ex. M). Avon declined to reconsider its discharge determination.

C. Proceedings In The Courts Below

Insofar as is relevant to this Petition, Byrne sued Avon for failing to provide him FMLA leave to treat his depression. The District Court granted Avon's motion for summary judgment, finding that Byrne had not given Avon notice that he needed FMLA leave prior to his discharge, and that he was unprotected by the Act because he would have been discharged in any event for neglecting his work responsibilities (Pet. App. 4a, 25a-26a, 29a) (citing 29 U.S.C. § 2614(a)(3)(B)).

The Court of Appeals vacated the District Court's judgment and remanded for trial. Although agreeing with the District Court's finding that Byrne's voicemail message and his sister's confirmation that he was "sick" did not constitute adequate FMLA notice (citing *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001)), the Court of Appeals found that Byrne's work behavior itself raised a jury question whether Avon had received notice of his medical condition and need for FMLA leave before his discharge (Pet. App. 4a-5a).

Alternatively, the Court of Appeals found that medical evidence might show at trial that Byrne was excused from the FMLA's minimum one or two days' notice requirement

(and perforce from *any* notice requirement) because his medical condition would constitute "*extraordinary circumstances where such notice is not feasible*" (Pet. App. 5a-6a) (quoting 29 C.F.R. § 825.303(a)) (emphasis in original).

The Court of Appeals concluded that if Byrne could prove at trial either that the "sudden change in his behavior was itself notice of a mental problem" or that he "indeed was unable to give verbal or written notice," Avon would have to reinstate him and reclassify as medical leave the period before his discharge which he had largely spent sleeping or reading in the carpenter's shop; upon reinstatement, Byrne would have to pay back his salary for this period (Pet. App. 6a-7a). The Court of Appeals apparently considered this unique potential remedy consistent with an employer's FMLA obligation to provide unpaid leave (Pet. App. 7a).[2]

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals obligates employers to grant FMLA leave to employees who report to work impaired by an undisclosed and unknown (to the employer) medical condition which causes them to engage in workplace misconduct. Employers must now screen such misconduct for signs of some serious underlying health problem and grant unsolicited FMLA leave to enable medical treatment. Like most employers, however, Avon's business is not medicine,

2. On remand, the Senior District Court Judge assigned to the case invoked 28 U.S.C. § 294(b) to have the case reassigned, explaining to counsel his unwillingness to accept the Court of Appeal's judicial activism and creative reading of the record (Pet. App. 29a; R. 39).

its supervisors are not psychiatrists, and its human resources department is not a walk-in health clinic. The Court of Appeals' decision is at odds with Congress's expressed intent in enacting the FMLA, and creates an unattainable standard implicitly rejected by at least three other Circuits. The Court should grant a writ of certiorari to clarify employee notice obligations under the Act and to resolve the Circuit-split created by the Court of Appeals' decision.

I. The Court Of Appeals' Decision Undermines Congressional Intent With Grave Implications For Employers.

Congress's stated purpose in passing the FMLA was: "(1) to balance the demands of the workplace with the needs of families . . . ; (2) to entitle employees to take reasonable leave for medical reasons . . . ; [and] (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers. . . ." 29 U.S.C. § 2601(b).

Notice is central to balancing the needs of employees to take FMLA leave and the obligations of employers to grant it. In cases of a foreseeable need for leave, the Act obligates employees to provide their employers with at least 30 days' notice. 29 U.S.C. § 2612(e)(2)(B). When the need for leave is unforeseeable, employees remain obligated to provide notice "as soon as practicable" – defined in the regulations as notice within one or two days, except in extraordinary circumstances where "such notice" (*i.e.*, at least one day) is not feasible. 29 C.F.R. § 825.303(a); *see* 60 Fed. Reg. 2180, 2221 (Jan. 6, 1995); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997). Even in a medical emergency requiring leave because of an employee's own serious health condition,

it is only "written" notice which may not be required. *See* 29 C.F.R. § 825.303(a); 60 Fed. Reg. 2180, 2221 (Jan. 6, 1995).

Nothing in the Act or its implementing regulations excuses an employee from providing notice altogether. To the contrary, the Courts of Appeals overwhelmingly agree that an employer's FMLA obligations are triggered only *after* the employee informs his employer that leave is needed. *See, e.g., Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847, 852 (8th Cir. 2002); *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1130-31 & n.20 (9th Cir. 2001); *Strickland v. Water Works & Sewer Board of the City of Birmingham*, 239 F.3d 1199, 1209 (11th Cir. 2001); *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 523 (6th Cir. 1998); *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980-81 (5th Cir.), *cert. denied*, 525 U.S. 826 (1998). "*Once* an employee taking unforeseeable leave informs his employer that potentially FMLA-qualifying leave is needed, the regulations place on the employer the burden of ascertaining whether the employee's absence actually qualifies for FMLA protection." *Strickland*, 239 F.3d at 1209 (emphasis added). "While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant." *Satterfield*, 135 F.3d at 980 (citation omitted).

The decision of the Court of Appeals here alters this carefully-crafted statutory and regulatory scheme, and places the burden on employers to scrutinize the workforce in order to divine medical-leave needs from unsatisfactory job performance. This imposed responsibility is potentially enormous; the corresponding benefit to employees as a whole is small.

A recent survey commissioned by the United States Department of Labor estimates that nearly 89 million employees in the United States are covered by the FMLA. Westat, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* § 3.2.1 & n.16 (2000), *available at* http://www.dol.gov/asp/fmla/main2000.htm. During the 18-month period covered by the *Westat* survey, an estimated 5.3 million eligible employees took FMLA leave. *Id.* § 3.5.1 & n.24. The Court of Appeals' decision could obligate employers to quiz the remaining 83.7 million employees whenever their job performance falters to determine if they, too, need FMLA leave. Few would benefit, however, since employees like Byrne who, for medical reasons may be unable to give notice of the need for FMLA leave, comprise less than 1% of the American workforce.[3] Requiring employers to scour the ranks of millions of workers in search of the small fraction of FMLA-covered employees who need medical leave but do not ask for it upsets the careful balance Congress struck between employee and employer obligations when it passed the FMLA. This unprecedented new requirement should not go unreviewed.

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3. The *Westat* survey found that while about 2.4% of employees believed they needed leave but did not request it, less than half of them (48.1%) needed leave for a personal medical condition. *Id.* §§ 2.2.1-2.2.2. Of these, most chose not to request leave because they could not bear the financial burden of unpaid time off. *Id.* at 2.2.4.

II. The Court Of Appeals' Decision That Sudden Workplace Misconduct Can Satisfy The FMLA's Notice Requirement Conflicts With Decisions Of The Fifth, Sixth And Eleventh Circuits.

The Court of Appeals' conclusion that an employee's changed workplace behavior exhibited as misconduct may itself provide the requisite FMLA notice does more than impose an enormous and unnecessary burden on employers at odds with Congressional intent. It also conflicts with decisions of the Fifth, Sixth and Eleventh Circuits which hold that an employee's failure to do his job is not, without more, adequate notice to the employer of the need for FMLA leave. The Court should grant a writ of certiorari to resolve the Circuit-split.

In *Brohm v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir. 1998), the employer learned that plaintiff, an anesthesiologist, had been falling asleep during surgeries. *Id.* at 519. Shortly before his discharge, plaintiff explained to his employer that he planned to consult a specialist to determine whether he was sleep-deprived as a result of sleep apnea. *Id.* Despite plaintiff's explanation, the employer discharged him for his misconduct. Following his discharge, plaintiff consulted a sleep specialist who confirmed plaintiff's self-diagnosis and successfully treated him. *Id.* at 520. Plaintiff sued under the FMLA and the District Court granted summary judgment for the employer because the plaintiff had not requested leave prior to his discharge. *Id.* at 523.

Affirming, the Sixth Circuit ruled that "nothing in the statute places a duty on an employer to affirmatively grant leave without such a request or notice by the employee. Rather, to invoke the protection of the FMLA, an employee

must provide notice and a qualifying reason for requesting the leave." *Id.* at 523. Citing an earlier Fifth Circuit decision, the Sixth Circuit noted that while an employee need not mention the FMLA by name, "'[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.'" *Id.* at 523 (quoting from *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995)). Implicit in the Sixth Circuit's decision is that sleeping on the job because of a medical condition is insufficient notice – a direct conflict with the Court of Appeals' decision in this case.

The Court of Appeals decision is also inconsistent with *Gay v. Gilman Paper Co.*, 125 F.3d 1432 (11th Cir. 1997), where the Eleventh Circuit affirmed summary judgment based upon plaintiff's failure to give sufficient notice of her need for FMLA leave. Plaintiff, who had a record of tardiness and absenteeism, failed to return to work as scheduled after a four-day leave. *Id.* at 1433. During her leave she was hospitalized for a nervous breakdown. *Id.* On the day she was due to return to work, her husband told her supervisor that she was in the hospital having some tests run, deliberately not disclosing her nervous breakdown. *Id.* The husband made no further effort to communicate with the supervisor and plaintiff was terminated a week later. *Id.* at 1433-34.

On appeal plaintiff argued that her husband's assertion that she was in the hospital for tests was sufficient to put her employer on notice that her condition was potentially FMLA-qualifying, and that nothing in the FMLA or its regulations requires more specific information. Rejecting both arguments, the court observed that an employee must give notice as soon as practicable, and that even when the

need for FMLA leave is unforeseeable, the employee must provide "notice sufficient to make the employer aware that [the] absence is due to a potentially FMLA-qualifying reason." *Id.* at 1436. In this instance, the court noted, not only was there a dearth of information, it was false. *Id.*

Byrne and his family likewise gave Avon scant and misleading information. All Avon knew prior to Byrne's discharge was that he, like Gay, had been effectively AWOL for weeks[4] and became suddenly "sick" with an undisclosed illness his family deliberately minimized. No aspect of Byrne's depression was disclosed. The day following his discharge, Avon learned that Byrne had been hospitalized but wasn't told why. It was fully three weeks later that Avon first learned of Byrne's depression and treatment.

The Court of Appeals decision conflicts as well with the Fifth Circuit's decision in *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973 (5th Cir.), *cert. denied*, 525 U.S. 826 (1998). In that case plaintiff was discharged for repeated unexcused absences in violation of her employer's attendance policy. Although plaintiff had a painful medical condition which ultimately required surgery, prior to her discharge the employer knew only that she was "sick," "was having a lot of pain in her side," and would not be able to work. *Id.* at 980. The court concluded that neither plaintiff's absences nor her meager medical disclosures had triggered the employer's FMLA obligations to inquire further:

> It is well to remember that the FMLA is designed only to protect employees when there is a "serious

4. The Court of Appeals recognized the equivalence of sleeping on the job and missing work altogether, ruling that Byrne might have to compensate Avon for his unproductive time (Pet. App. 7a).

> health condition," and only in a manner that "accommodates the legitimate interests of employers." 29 U.S.C. § 2601(a)(4), (b)(3). Requiring an employer to undertake to investigate whether FMLA-leave is appropriate each time an employee, who has been absent without excuse three times in the preceding three weeks, informs the employer that she will not be at work "that day" because she is "having a lot of pain in her side" or is "sick", is quite inconsistent with the purposes of the FMLA, because it is not necessary for the protection of employees who suffer from "serious health conditions," and would be unduly burdensome to employers to say the least."

Id. at 981.

Because the Fifth, Sixth and Eleventh Circuits have all concluded that employee behavior alone does not amount to notice of need for FMLA leave, the Court should grant a writ of certiorari to resolve the split created by the Court of Appeals' decision in this case.

III. The Court Of Appeals' Decision That 29 C.F.R. § 825.303(a) Allows Post-termination Notice Conflicts With Decisions Of The Sixth Circuit.

The Court of Appeals held, in the alternative, that even if Byrne's workplace behavior was insufficient to notify Avon of his medical condition and need for leave, his subsequently diagnosed medical condition could constitute "extraordinary circumstances" within the meaning of 29 C.F.R. § 825.303(a) and exempt him from pre-discharge notice (Pet. App. 6a). As noted earlier, Section 825.303(a) of the regulations

provides that where the need for FMLA leave is unforeseeable, "[i]t is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible." 29 C.F.R. § 825.303(a). Highlighting the "except in extraordinary circumstances" language, the Court of Appeals reasoned that even post-discharge notice can be effective if an employee's medical condition prevents earlier notice (Pet. App. 6a-7a).

The Court of Appeals' construction of Section 825.303(a) conflicts with two decisions of the Sixth Circuit holding that post-termination notice is untimely as a matter of law. The Sixth Circuit has properly read Section 2612(a)(1)(D) of the Act as setting an absolute time limit for FMLA notice which expires with the termination of the employment relationship. *Brohm*, 149 F.3d at 523; *accord Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 451 (6th Cir. 1999). Emphasizing that only "an *eligible employee* shall be entitled to a total of 12 workweeks of leave" under the Act, the Sixth Circuit has held that an employee lawfully terminated before requesting relief is not allowed, as a matter of law, to provide his employer with post-termination notification of a serious health condition. *Brohm*, 149 F.3d at 523 (citing 29 U.S.C. § 2612(a)(1)(D)); *accord Hammon*, 165 F.3d at 451.

The exemption that the Court of Appeals reads into Section 825.303(a) for employees who, for reasons unknown to their employers, are medically unable to provide notice of the need for FMLA leave, conflicts with the absolute time limits prescribed by the Sixth Circuit in *Hammon* and *Brohm*. The Court should grant a writ of certiorari to resolve this inconsistency and to curtail judicial activism which effectively rewrites the statute.

IV. The Court Of Appeals' Decision Is Wrong In Any Event.

Not only is the Court of Appeals' decision at odds with the notice structure embodied in the FMLA, it conflicts with other terms of the statute and with case law holding that the FMLA is not a free pass for employees to perform poorly and then use their medical conditions as an excuse.

Section 2614(a)(3)(B) of the Act makes clear that no employer has an obligation to confer a "right, benefit, or position of employment" that the employee would not have been entitled to if the employee had never left the workplace. 29 U.S.C. § 2614(a)(3)(B). This Court of Appeals has already recognized the import of this provision: "[A]n employee may be fired for poor performance when she would have been fired for such performance even absent her leave." *Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799, 805 (7th Cir. 2001). No exceptions need be made for an employee's medical condition.

> While it may be true that the [employee's] problems were a result of her illness, the FMLA does not protect an employee from performance problems caused by the condition for which FMLA leave is taken, nor does it require that an employee be given an opportunity to show improved job performance when not ill.

McBride v. Citgo Petroleum Corp., 281 F.3d 1099, 1108 (10th Cir. 2002). Yet by forcing Avon to undo its legitimate decision to fire Byrne for sleeping on the job, the Court of Appeals has conferred on Byrne an employment benefit that no healthy employee caught sleeping on the job would have enjoyed. Its decision is erroneous and should be reversed.

CONCLUSION

Byrne is a sympathetic, but extremely rare, casualty of a statutory and regulatory scheme that works very well. The Court of Appeals' modification of that scheme placing discovery obligations on employers in order to marginally improve the FMLA's effectiveness in those few cases where an employee's leave needs are legitimate, but undisclosed, is costly, unworkable, and antithetical to Congress' expressed goal of achieving balance.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 9, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 02-2629

JOHN BYRNE,

Plaintiff-Appellant,

v.

AVON PRODUCTS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 00 C 5378—**Milton I. Shadur**, *Judge*

ARGUED APRIL 14, 2003—DECIDED MAY 9, 2003.

Before CUDAHY, POSNER, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* After more than four years of highly regarded service as the only stationary engineer on the night shift at Avon Products, John Byrne started to read and sleep on the job. Early in November 1998 a co-worker reported finding Byrne asleep in the carpenter's shop, which night employees sometimes use as a break room.

Appendix A

Avon checked security logs (employees need a coded card to enter the carpenter's shop) and learned that Byrne had begun to frequent it. To investigate further, Avon installed a camera, which on its first night of operation revealed that Byrne spent about three hours of his shift reading or sleeping. The following shift Byrne lingered about six hours in the carpenter's shop, most of that time asleep with the lights off. Managers tried to discuss matters with Byrne on his next scheduled shift (November 16-17) but were unable to do so because he left work early, telling a co-worker that he was not feeling well and would be out the rest of the week. Calls were answered by one of his sisters, who told Avon that Byrne was "very sick". James Sparks, Avon's facilities engineer, finally reached Byrne, who mumbled several odd phrases but agreed to attend a meeting the afternoon of November 17. When Byrne did not appear, he was fired for that omission plus sleeping on the job. Byrne was in no shape for a conference, however, as he was suffering from depression. Relatives took him to the hospital after talking him out of a room in which he had barricaded himself. A psychiatrist concluded that by November 16 Byrne had begun to hallucinate; he attempted suicide on November 17 and during another panic attack tried to flush his head down a toilet. But two months of treatment enabled Byrne to surmount his mental difficulties. When Avon would not take him back, Byrne filed this suit under the Americans with Disabilities Act and the Family and Medical Leave Act. The district court granted summary judgment to Avon, ruling that neither statute excuses misconduct on the job. 2002 U.S. Dist. LEXIS 9252 (N.D. Ill. May 22, 2002).

Appendix A

The ADA forbids employers to discriminate against any "qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). "Qualified individual with a disability" is a defined term: "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). From November 1998 through mid-January 1999 Byrne could not stay awake (sleep disturbance is a common symptom of depression's onset) and had become too suspicious of his co-workers to tolerate them. As a result he was incapable of working. Byrne acknowledges this but contends that he should have been accommodated by being allowed *not* to work. That is not what the ADA says. The sort of accommodation contemplated by the Act is one that will allow the person to "perform the essential functions of the employment position". Not working is not a means to perform the job's essential functions. An inability to do the job's essential tasks means that one is not "qualified"; it does not mean that the employer must excuse the inability.

Time off may be an apt accommodation for intermittent conditions. Someone with arthritis or lupus may be able to do a given job even if, for brief periods, the inflammation is so painful that the person must stay home. See *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998). Cf. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 498 (7th Cir. 2000) (part-time work may accommodate a person recovering from a medical problem). But Byrne did not want a few days off or a part-time position; his only proposed accommodation is not working for an extended time, which as far as the ADA is concerned

confesses that he was not a "qualified individual" in late 1998. "The rather common-sense idea is that if one is not able to be at work, one cannot be a qualified individual." *Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir. 1999). Spotty attendance by itself may show lack of qualification. *See EEOC v. Yellow Freight System, Inc.*, 253 F.3d 943 (7th Cir. 2001) (en banc). Inability to work for a multi-month period removes a person from the class protected by the ADA.

Although the ADA applies only to those who can do the job, the FMLA affords those who can't work as a result of a "serious health condition" up to 12 weeks of leave in a year. 29 U.S.C. § 2612(a)(1)(D). Byrne's condition was serious, and he was ready to work again before the 12 weeks ran out.

FMLA leave depends on the employer's knowledge of a qualifying condition, and Byrne contends that his sister's statement on November 17 that he was "very sick" plus news of his hospitalization, which reached Avon the next day, provided the necessary information. Contrast *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001) (employee's claim to be "sick" is not enough). But the district judge thought that notice on November 17 came too late. For the preceding ten days or so, Byrne had been sleeping on the job, which justified his discharge. (The district judge added, and we agree, that the record would not permit a reasonable trier of fact to conclude that Avon discharged Byrne because of, rather than in spite of, the information about Byrne's mental health that it received on November 17 and 18.)

Perhaps, however, Byrne's unusual behavior (recall that he had been a model employee until November 1998) was

itself notice that something had gone medically wrong, or perhaps notice was excused—for the statute requires notice only if the need for leave is foreseeable. See 29 U.S.C. § 2612(e); *Gilliam v. United Parcel Service, Inc.*, 233 F.3d 969 (7th Cir. 2000). It is not beyond the bounds of reasonableness to treat a dramatic change in behavior as notice of a medical problem. That's clear enough if a worker collapses: an employer might suspect a stroke, or a heart attack, or insulin deficiency, or some other serious condition. It would be silly to require the unconscious worker to inform the employer verbally or in writing. Unusual behavior gives all the notice required, and no employer would be allowed to say "I fired this stricken person for shirking on company time, and by the time a physician arrived and told me why the worker was unconscious it was too late to claim FMLA leave." A sudden change may supply notice even if the employee is lucid: someone who breaks an arm obviously requires leave. It is enough under the FMLA if the employer knows of the employee's need for leave; the employee need not mention the statute or demand its benefits. See, e.g., *Price v. Ft. Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997).

Byrne's situation is more complex because he hid in the carpenter's shop for several days running. This is consistent with onset of a disabling mental condition but also could be no more than malingering. Why, one might ask, did Byrne not notify supervisors and seek time off earlier—or just leave word with a co-worker and go home, as he did on November 17? That poses a medical question: Was someone in Byrne's state *able* to give notice? Medical information in the record would permit (though not compel) a jury to conclude that by early November 1998 Byrne not only was

unable to regulate his sleep cycles but also had become suspicious of other people and was powerless to communicate his condition effectively. A person unable to give notice is excused from doing so.

> When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, *except in extraordinary circumstances where such notice is not feasible.* In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

29 C.F.R. § 825.303(a) (emphasis added). If a person with "major depression" (the psychiatrist's description of Byrne's condition) could not have told his employer about the problem and requested leave, then notice was not "feasible" and was unnecessary even if the change in behavior was not enough to alert Avon to a need for medical leave.

If a trier of fact believes either (a) that the change in behavior was enough to notify a reasonable employer that Byrne suffered from a serious health condition, or (b) that

Byrne was mentally unable either to work or give notice early in November 1998, then he would be entitled to FMLA leave covering the period that Avon treats as misconduct. These are independent possibilities. Either one would entitle Byrne to reinstatement, see 29 U.S.C. § 2614(a), when the "serious health condition" had abated. Instead of treating Byrne's final two weeks as goldbricking, Avon should have classified this period as medical leave—if Byrne indeed was unable to give verbal or written notice, or if the sudden change in his behavior was itself notice of his mental problem. In either event, the FMLA would require adjustment of Byrne's pay status, for leave under this act is unpaid except to the extent that an employee has accrued medical or vacation leave available. 29 U.S.C. § 2612(c), (d). A judge would be entitled, under circumstances such as these, to require the employee to agree, as a condition of pursuing relief under the FMLA, that unproductive time preceding the discharge be reclassified as unpaid leave (with restitution of wages received) or taken as vacation or medical leave if any is available. Because the district court did not consider the possibility that Byrne's last two weeks should be reclassified as FMLA leave, it did not consider what adjustments along these lines may be appropriate. That subject should be handled promptly on remand.

VACATED AND REMANDED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 22, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 00 C 5378

JOHN BYRNE,

Plaintiff,

v.

AVON PRODUCTS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

John Byrne ("Byrne") has charged his former employer Avon Products, Inc. ("Avon") with employment discrimination in violation of the Americans with Disabilities Act ("ADA," 42 U.S.C. §§ 12101-12117)[1] and the Family and Medical Leave Act ("FMLA," 29 U.S.C. §§ 2601-2654). Avon seeks summary judgment under Fed. R. Civ. P. ("Rule")

1. Further ADA citations will take the form "Section —," using the Title 42 numbering rather than ADA's internal section numbers.

56, and both sides have complied with District Court LR 56.1.[2] Avon wins.

Summary Judgment Standards

Familiar Rule 56 principles impose on Avon the burden of establishing the lack of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). For that purpose this Court must "read[] the record in the light most favorable to the non-moving party," although it "is not required to draw unreasonable inferences from the evidence" (*St. Louis N. Joint Venture v. P & L Enters., Inc.*, 116 F.3d 262, 265 n.2 (7th Cir. 1997)). As *Pipitone v. United States*, 180 F.3d 859, 861 (7th Cir. 1999) has quoted from *Roger v. Yellow Freight Sys., Inc.*, 21 F.3d 146, 149 (7th Cir. 1994):

> A genuine issue for trial exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole.

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2. LR 56.1 is designed to facilitate the resolution of Rule 56 motions by calling for evidentiary statements and responses to such statements (in each instance with record citations), thus highlighting the existence or nonexistence of factual disputes. This opinion cites to Avon's LR 56.1(a)(3) statement as "A. St. ¶ —" and to Byrne's 56.1(b)(3)(B) statement of additional facts as "B. St. ¶ —." Byrne's response to Avon's LR 56.1(a)(3) statement is cited as "B. Resp. ¶ —," although where an A. St. assertion is not controverted a citation to the latter ordinarily suffices. Avon's response to Byrne's statement of additional facts is cited as "A. Resp. ¶ —." This opinion employs the same "A." and "B." abbreviations when referring to the parties' exhibits ("Ex.") and memoranda ("Mem.").

Appendix B

As with any summary judgment motion, this Court accepts nonmovant Byrne's version of any disputed facts, but only so long as it is supported by record evidence. What follows in the *Facts* section is culled from the parties' submissions in that manner.

Facts

Byrne's Employment and Discharge

Byrne was hired by Avon on July 1, 1994 and worked at its Morton Grove facility until his discharge on November 18, 1998[3] (A. St. ¶2). Throughout his employment with Avon Byrne was the sole stationary engineer on the third shift, which ran from 10 p.m. to 6 a.m. (*id.* ¶3). His duties included maintaining the operation of the facility's steam system and assisting other Avon employees as needed (*id.* ¶4). Byrne reported to Facilities Engineer James Sparks ("Sparks"), who in turn reported to Engineering Unit Leader Gregory Korak ("Korak") (*id.* ¶7). Until November 1998 Byrne had an almost perfect attendance record, consistently worked overtime and was considered by Avon management to be a very dependable employee (B. St. ¶¶60, 63).

On November 7 Avon employee Rick Anderson ("Anderson") entered the carpenter's shop at the plant and saw Byrne lying back in a chair with his feet propped up and his eyes closed (A. St. ¶¶8-9). Byrne denies that he was sleeping, but he admits that Anderson found him as described

3. Because all operative events bearing on Byrne's claims occurred in 1998, each date referred to later in this opinion omits the year designation.

(B. Resp. ¶¶9-10). On November 9 Anderson told Sparks that he had discovered Byrne sleeping in the carpenter's shop (*id.* ¶11). Sparks in turn told Korak, who thought that it was unusual for Byrne to be in the shop, a restricted area located approximately 300 feet away from Byrne's work area in the boiler room (*id.* ¶¶6, 12; B. St. ¶117). Because Byrne needed access to the tools in the carpenter's shop in case he had to make a repair, he was one of some 10 to 15 employees issued a security card that would open the door to the shop (B. St. ¶¶108, 111, 115). Employees were known to use the carpenter's shop as a break room (B. St. ¶107).

Sparks and Korak discussed the matter, and both concluded that Byrne might pose a performance issue (A. St. ¶12). They decided to review the security log for the carpenter's shop, which automatically records the date and time that anyone uses an access card to enter (but not to leave) the shop (A. St. ¶13; B. St. ¶109). Log entries showed that Byrne had entered the shop on every scheduled workday from October 26 until November 11, often two or three times a shift (A. St. ¶14). According to the log, Byrne had been in the carpenter's shop for approximately 52 minutes when Anderson discovered him in the chair with his eyes shut (*id.* ¶15).

After reviewing the security log, Sparks and Korak decided to install a video camera in the shop to record what Byrne was doing in the room (B. St. ¶120). By the evening of November 11 a camera was installed at a cost to Avon of about $1,000 (*id.* ¶¶124-25). At that point Sparks did not talk to Byrne about the matter because he believed that would have "compromised the investigation" (*id.* ¶123).

Appendix B

On the morning of November 12 both Sparks and Korak reviewed the videotape from Byrne's just-concluded 10 p.m. to 6 a.m. shift (A. St. ¶18). It showed (*id.* ¶19):

> 1. From 12:30 a.m. until 2:43 a.m. Byrne read and slept while sitting in a chair in the carpenter's shop.
>
> 2. From 2:44 a.m. until 3:05 a.m. Byrne read while sitting in a chair in the carpenter's shop.
>
> 3. From 4:25 a.m. until 4:51 a.m. Byrne again read while sitting in a chair in the carpenter's shop.

At his later deposition Byrne denied sleeping during that shift but admitted that he was in the shop for approximately three hours without working (*id.* ¶20). On the following morning, November 13, Sparks and Korak reviewed the videotape from Byrne's shift the previous night and found (*id.* ¶22):

> 1. From 10:19 p.m. until 10:52 p.m. Byrne read while sitting in the carpenter's shop.
>
> 2. From 11:53 p.m. until 1:46 a.m. Byrne slept while sitting in the carpenter's shop.[4]
>
> 3. From 1:59 a.m. until 4:20 a.m. Byrne slept with the lights off.

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4. Avon asserts that Byrne was reading as well as sleeping during this period, which Byrne denies (B. Resp. ¶22).

At his deposition Byrne denied sleeping during that shift too, but he admitted that he was in the shop for nearly five hours without working (*id.* ¶23).

Korak and Sparks agreed that they would try to speak with Byrne sometime during his November 16-17 shift, but they did not tell Byrne of their intention to meet with him (*id.* ¶27; B. St. ¶139). They and Avon's Senior Manager of Human Resources Brenda LeMire have differing recollections about whether the purpose of the meeting was to suspend or terminate Byrne or simply to discuss the situation with him and then to decide what action to take (*id.* ¶¶140-48). In any event, Korak did not prepare termination papers before attempting to meet with Byrne (*id.* ¶149).

Sparks arrived at Avon at 3 a.m. on November 17, planning to meet with Byrne and Korak (A. St. ¶32). He looked for Byrne but was unable to find him (*id.* ¶33). Sparks then spoke with a security guard, who told him that earlier in the shift he had an "odd" conversation with Byrne, during which Byrne had shaken hands with the guard, said good-bye and then left the plant (B. St. ¶¶156, 165). In addition, the security guard told Sparks that Byrne had left a message on Spark's voicemail (A. St. ¶33). In that message Byrne said that he was "not feeling well" and would be out for the rest of the week (*id.* ¶30). When Korak arrived at 4 a.m., Sparks told him about the voicemail message and Byrne's discussion with the security guard (B. St. ¶165).

At about 4 a.m. Sparks called Byrne at home (A. St. ¶34). He spoke with Byrne's sister Sheila Byrne ("Sheila"),

who said that if Byrne was not at work he was probably at the home of Byrne's other sister Madge Rodgers ("Rodgers") (*id.*). Sheila telephoned her sister and then called Sparks back to let him know that Byrne was indeed at the Rodgers house (*id.* ¶¶34-35). During one of those conversations Sparks asked Sheila if she had noticed Byrne "being strange" (*id.* ¶36; B. St. ¶226). She said "no" (A.St.¶ 36).

Sparks called the Rodgers household at least three and possibly more than five times that day, but he was initially able to reach only Rodgers and not Byrne (A. St. ¶37; B. St. ¶186). First Rodgers told Sparks that Byrne was vomiting and too ill to speak on the phone (A. St. ¶37; B. St. ¶¶176, 178). She said that Byrne was "sick, very sick," but she was not sure what was wrong with him (B. St. ¶225). In two of their conversations Sparks told Rodgers to get Byrne to a doctor (*id.* ¶224). At another point in one of their conversations, Sparks asked Rodgers whether she had noticed that Byrne was acting "strange" or that there was "something wrong with him" (*id.* ¶227). Like Sheila, she said "no" (B. Ex. F at 44).

Finally, at about 1 p.m. November 17 Sparks spoke with Byrne on the telephone (A. St. ¶39). During that conversation Byrne was mumbling and repeating words (B. St. ¶189). When Sparks asked him what was wrong with him, Byrne did not answer (*id.* ¶217). Sparks also asked Byrne for his doctor's number but received no answer (*id.* ¶218). When Sparks asked if he had a fever, Byrne just repeated "fever, fever" (B. St. ¶220; A. Ex. J). Sparks told Byrne to come to a meeting at 3:30 p.m. at the Avon plant, stressing that it was important (A. St. ¶40). Although Byrne at first

declined, "mumbling" that he had a doctor's appointment, he eventually agreed to come to the meeting (B. St. ¶219; A. St. ¶41).

In fact Byrne did not appear for that meeting with Sparks, nor did he call to cancel it (A. St. ¶41). Instead Rodgers took Byrne to the hospital, where he was admitted but not diagnosed (*id.* ¶42). No one at Avon was told that Byrne was admitted to the hospital until the following morning, November 18 (id. ¶¶42, 47).[5]

When Byrne failed to appear for the scheduled meeting with Sparks and Korak, Korak immediately recommended to both Human Resources Supervisor Mary Ellen Spedale and General Manager Bill Baronti that Byrne be terminated (*id.* ¶43). Both agreed to the termination, and Korak prepared

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5. Throughout the filings Byrne's counsel consistently (and insistently) argues that a genuine issue of material fact exists as to whether Avon first learned of Byrne's hospitalization on November 17 or 18. That assertion is based on the fact that Sparks originally stated in his deposition that Rodgers told him about Byrne's hospitalization on the 17th (B. St. ¶235). After a break in the deposition, however, Sparks returned and corrected himself, stating that the conversation with Rodgers actually took place on November 18 (A. Resp. ¶235). If the November 17 date were right, it would move Avon's knowledge of Byrne's hospital admission back to the same day on which the termination decision was made. But any such possibility is negated by the fact that Byrne's own sister Rodgers corroborates November 18 as the date on which she first informed Avon about Byrne's hospitalization (*id.*; A. St. ¶47). In light of Rodgers' corroboration, any attempt to create a genuine issue of material fact on that subject is, to be charitable, disingenuous. Summary judgment treatment does not call for such an unreasonable inference.

a standard discharge letter and a "discussion form" to effect it (*id.*). On November 18 Avon mailed Byrne the letter terminating his employment for "misuse" of company time (*id.* ¶44). During his later deposition Byrne conceded that he misused company time by exceeding allotted break times for extended periods (*id.* ¶45).

Byrne's Mental State

According to Byrne's psychiatrist, sleep disturbances caused by depression began affecting his work in October 1998 (B. St.¶92). When Byrne arrived at work on November 16, he felt nauseous and nervous (*id.* ¶93). Byrne started to hallucinate, believing that there were cameras in the boiler room and that security guards were following him (*id.* ¶94). He began dry heaving and thought he might be having a heart attack, and he called Rodgers to come and pick him up (*id.* ¶95).

While at Rodgers' house that morning, Byrne grabbed a pair of scissors and tried to cut his wrists (*id.* ¶97). Byrne then locked himself in the family room until about 2 p.m. November 17 (*id.* ¶98). Because of his debilitation, Byrne has no clear recollection of the conversation with Sparks (*id.* ¶99). He remembers agreeing to meet with Sparks but then recalls having another panic attack, during which he tried to flush his head down the toilet and banged his head against the wall (*id.*). Byrne then went to the hospital, where he stayed for eight days and was eventually diagnosed with major depression (*id.* ¶103; A. St. ¶50).

Until mid-December Byrne attended a day program for therapy (B. St. ¶¶103-04). After the therapy ended Byrne

continued to see his psychiatrist every month, later reducing his appointments to once every three months (*id.* ¶105).

ADA Claim

Avon invokes *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997) to make the threshold argument that because Byrne was fired for his own misconduct, he falls outside the umbrella of protection provided to employees by ADA (A. Mem. 4-6). *Palmer*, *id.* at 352 held:

> But if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act.

Avon's reliance on that language is no better than specious, as even a brief analysis readily demonstrates. Unlike *Palmer*, where it was already established that the employee was fired "because of" her unacceptable behavior, Byrne asserts that he was fired "because of" his mental illness (B. Mem. 10-13). Moreover, Avon ignores *Palmer*'s later recognition (117 F.3d at 353) that "an employer has a statutory duty to make a 'reasonable accommodation' to an employee's disability." Because there is no evidence suggesting that Byrne is violent or presents a danger to his coworkers, *Palmer*'s summary dismissal of the reasonable accommodation question based on the employee's repeated threats to commit violent acts is inapposite here.

Section 12112(a) prohibits an employer from discriminating against "a qualified individual with a disability

because of the disability." Under ADA's "Title I, a covered entity may discriminate in two ways: disparate treatment of or failure to accommodate a disabled employee" (*Stevens v. Illinois Dep't of Transp.*, 210 F.3d 732, 736 (7th Cir. 2000)). Because Byrne charges Avon with both disparate treatment and failure to accommodate, this opinion examines Byrne's wrongful termination claim from both perspectives.

Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999) (citations omitted and adapted to this case) describes a plaintiff's required showing[6] under failure-to-accommodate analysis:

> (1) [he] was or is disabled; (2) the defendant was aware of [his] disability; (3) [he] was otherwise qualified for [his] job; and (4) the disability caused the adverse employment action (a factor which is implied if not stated).

And as for the disparate treatment approach, *Gorbitz v. Corvilla, Inc.*, 196 F.3d 879, 882 (7th Cir. 1999) (adapted to this case) says that Byrne must first show:

> (1) [he] was disabled; (2) [his] work performance met [Avon's] legitimate expectations; (3) [he] was

6. In the summary judgment context, of course, Byrne's burden is only that of creating reasonable inferences, not one of proof as such (see *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994)). But any continued repetition of that burden involves an awkward locution, an awkwardness contributed to by the fact that so much of the caselaw speaks of what an employee must "prove" or "show." Whenever this opinion employs such terms, it should therefore be understood as denoting Byrne's lesser burden of creating reasonable inferences, not the actual burden of persuasion.

> terminated; and (4) the circumstances surrounding [his] termination indicate that it is more likely than not that [his] disability was the reason for the termination.

Because Byrne must establish that he is "a qualified individual with a disability" to proceed under either approach, that question will be addressed first.

Qualified Individual with a Disability

To show that he has a disability within the meaning of ADA, Byrne must demonstrate not only that he suffers from an "impairment," but also that the impairment "substantially limits one or more of the major life activities" (Section 12102(2)(A)). Any mental disorder constitutes an impairment for ADA purposes (*Harrington v. Rice Lake Weighing Sys., Inc.*, 122 F.3d 456, 459 (7th Cir. 1997), citing 29 C.F.R. § 1630.2(h)). And in this instance Byrne's deposition, the records from his hospital stay and the statement of his physician all support the fact that he suffered from major depression with psychotic features (B. Ex. A. 138-48; B. Ex. M; A. Ex. M).

But under Section 12102(2)(A) Byrne has the additional burden of showing that such depression "substantially limits [his] ability to perform a major life activity" (*Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1061 (7th Cir. 2000)). Whether an impairment constitutes a disability depends on an individualized assessment (*Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 692 (2002)).

Appendix B

Here Byrne urges that his impairment substantially limited the major life activities of sleeping, thinking and interacting with others (B.Mem.8). Although Avon concedes that those are major life activities for ADA purposes, it argues that "[Byrne] does not present any evidence to show how *his* depression substantially limits *his* major life activities" (A.R. Mem. 8, emphasis in original). But the depositions of Byrne and his relatives show that before his termination Byrne's mental state had degenerated to the point where he was incoherent, suffered sleep disturbances and hallucinations, had a paranoid belief that his co-workers were spying on him and laughing at him, locked himself away from his family, sliced his wrists with scissors and had to be tricked before he could be taken to the hospital (B. St. ¶¶ 94, 97, 98, 216, 244; A. Ex. M). Byrne has thus presented a genuine factual issue on that score.

As for the required showing that he is a "qualified individual," Byrne must demonstrate both (1) that he satisfies the prerequisites for the position, such as proper training, skills and experience, and (2) that he is capable of performing the essential functions of the job, either with or without reasonable accommodation (*Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1284 (7th Cir. 1996)). Byrne clearly satisfies the first requirement, for he had held the job of stationary engineer with Avon for over four years and had received favorable performance reviews (B. St. ¶¶ 63-64). But that is not enough: Byrne relies almost exclusively on his *past* performance while ignoring the second—and current—*Bultemeyer* requirement.

Under ADA "the burden of proof on the issue of capability is not on the employer but on the plaintiff" (*Miller*

v. Illinois Dep't of Corrs., 107 F.3d 483, 484 (7th Cir. 1997)) At the time of his termination Byrne certainly was no longer a "qualified individual" without accommodation—repeatedly sleeping and reading while at work, as well as leaving in the middle of a shift, were failures to perform the "essential functions" of his job. And Byrne does not even attempt to show how or when, with reasonable accommodation, he would again become a "qualified individual." Instead he advances a bare assertion that "[t]he reasonable accommodation in this case would clearly be a leave for hospitalization and the extended day outpatient program" (B. Mem. 14). Byrne provides no medical or other relevant evidence to demonstrate what is needed, how long it would take, how it would affect his future ability to function as a stationary engineer and why the accommodation would be reasonable for his employer. Only a December 11 letter from Byrne's psychiatrist is in the record, and it simply stated that Byrne had been in "treatment" since November 17 and made the uninformative request that Avon "[p]lease take reconsideration regarding his employment status" (A. Ex. M). That is totally insufficient to establish a triable issue as to whether some undefined reasonable accommodation would restore Byrne to his status as a "qualified individual."

Because Byrne has thus failed to adduce sufficient evidence to show that he was a "qualified individual with a disability," he is not entitled to ADA protection. This opinion might well end at this point. But further analysis shows that Byrne's ADA claim is fatally defective in more than that respect: Even if he had overcome that threshold hurdle, his

failure to show that Avon knew or should have known about his disability when it terminated him would torpedo his claim in any event.

Avon's Awareness

Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 932 (7th Cir. 1995) articulates the obvious:

> At the most basic level, it is intuitively clear when viewing the ADA's language in a straightforward manner that an employer cannot fire an employee "because of" a disability unless it knows of the disability.

Byrne argues that Sparks and Korak were so concerned "about Byrne's mental stability" that they decided to "cook up the idea of installing the camera in the carpenter's shop" (B. Mem. 9). That version of events is entirely speculative—Byrne has not submitted a shred of evidence that Sparks, Korak or anyone else at Avon knew or should have known of Byrne's disability at that time. Sparks and Korak had the camera installed on November 11 after learning from Anderson's story and from their review of the security log that Byrne might have a performance problem. Nothing in the record even hints at—let alone reflects on—Byrne's mental state until the security guard's generalized comment to Sparks on the morning of November 17 that he had an "odd" conversation with Byrne (B. St.¶ 165).[7] When Sparks

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7. And it requires a quantum leap to stretch the word "odd" in that way, as Byrne seeks to do.

retrieved Byrne's voicemail message, he learned nothing about Byrne's mental state, just that Byrne was "not feeling well" and would be out the rest of the week (A. St. ¶30).

In his conversations with Byrne's relatives on November 17 Sparks was told that Byrne was very ill, was too sick to come to the phone, had locked himself in the family room and his relatives were trying to get him to a doctor (B. St. ¶¶223, 233). Sparks recounts that when he finally did manage to speak with Byrne he was feverish and mumbling (B. St. ¶¶219-20). Thus Avon then had notice that Byrne was suffering from some sort of unidentified illness.

But there is nothing from which one could reasonably infer that the company should have known that Byrne had a mental disability serious enough to qualify him for ADA protection, as opposed to any of the countless possible temporary physical ailments (particularly manifesting themselves with feverishness) that could have caused such symptoms. In light of the combined information (or more accurately lack of information) that Avon's people then had, it is entirely understandable that (1) in order to get more information Sparks asked each sister if their brother had been acting unusual or strange lately (A. St. ¶¶36-37) (both answered "no") and (2) in partial response Rodgers asked Sparks if he had noticed Byrne being very depressed lately (B. St. ¶187). That scenario, when properly viewed with reasonable inferences in Byrne's favor, in no way supports his strained inferences not only that Sparks was "obsessed with Byrne's mental status," but also that Sparks and Korak's solution to their "extreme discomfort in dealing with a mentally ill employee was to terminate Byrne 'no matter what'" (B. Mem. 9-10).

Even more to the point, Avon was not required to have greater knowledge (or perhaps foreknowledge) than the information provided to Sparks in response to his concerned inquiries. Both Sheila and Rodgers answered him by saying they had not noticed anything strange about Byrne's behavior (A. St. ¶ 36; B. Ex. F at 44). Furthermore, Rodgers told Sparks that she "didn't know what was wrong with [Byrne]," and she admits that she did *not* tell Sparks that Byrne needed time off from work because she "had no idea" whether that was the case (A. Ex. B at 44, 49).

After all, "ADA does not require clairvoyance" (*Hedburg*, 47 F.3d at 934). Surely the brief reference by the security guard to an "odd" conversation did not equate to a suggestion that Byrne suffered an impairment before the November 17 decision was made to discharge him. Again all of Avon's other information came from the conversations that Sparks had with Byrne and his relatives on the morning and afternoon of the 17th. It would be entirely unreasonable to infer that merely by asking about Byrne's behavior, Sparks somehow divined (with more insight than Byrne's own sisters) (1) that Byrne was suffering from a mental as opposed to purely physical illness, (2) that such mental illness was of sufficient severity to qualify under and (3) that the unknown illness had caused Byrne's sleeping and reading on the job nearly a week earlier, so that Sparks and Korak decided to terminate Byrne to avoid their responsibilities under federal law. This Court is not required to draw such unreasonable inferences.

Byrne attempts to manufacture a triable issue by claiming that he "was only fired after Avon learned he was in the

hospital" (B. Mem. 9). But Avon's management decided to terminate Byrne on November 17 after he failed to show up for the scheduled 3:30 p.m. meeting—a fact that even Byrne admits (B. Resp. ¶43). And as n. 5 has discussed, Rodgers herself corroborates Sparks' testimony that he first learned of Byrne's hospitalization on November 18.

In sum, Byrne has failed to show that he was fired "because of" his disability.[8] Because failure on the causation element also dooms his attempt to establish a prima facie ADA case under either the *Foster* (failure to accommodate) test or the *Gorbitz* (disparate treatment) test, there is no need to consider Byrne's pretext argument.

FMLA Claim

Byrne argues that Avon's failure to grant him FMLA leave when it learned he was hospitalized violated FMLA (B. Mem. 14-15). But a conclusive and fatal flaw in that position (and there are others) is that FMLA does not protect employees whose discharge would have occurred despite FMLA leave entitlement. As stated in *Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799, 805 (7th Cir. 2001) (adapted to this case):

> However, an employee may be fired for poor performance when [he] would have been fired for such performance even absent [his] leave.

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8. It bears repeating that due to Byrne's failure on the "qualified individual" branch of the statutory inquiry, the conclusion just stated in the text would be the same even if the just-completed causation analysis had come out the other way.

See also 29 U.S.C. § 2614(a)(3)(B)). What has already been said establishes that Byrne cannot overcome Avon's assertion that he would have been terminated regardless of any leave to which he may have been entitled, because he repeatedly neglected his work responsibilities by sleeping and reading in the carpenter's shop for extended periods.

Conclusion

While Byrne's difficulties evoke sympathy, what controls here is his inability to present evidence from which a reasonable jury could find in his favor on either of his federal claims. Because Byrne has not shown any genuine issue of material fact, Avon is entitled to a judgment as a matter of law. Its summary judgment motion is granted in its entirety, and this action is dismissed with prejudice.

s/ Milton I. Shadur
Milton I. Shadur
Senior United States District Judge

Date: May 22, 2002

APPENDIX C — TRANSCRIPT OF PROCEEDINGS DATED JUNE 2, 2003

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKET NO. 00 C 5378

Chicago, Illinois
June 2, 2003
9:15 o'clock a.m.

JOHN BYRNE,

Plaintiff,

vs.

AVON PRODUCTS, INC.,

Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
MILTON I. SHADUR, Judge

* * *

THE CLERK: 00 C 5378, Byrne vs. Avon.

MS. HUBBARD: Good morning, your Honor. Elizabeth Hubbard on behalf of the plaintiff John Byrne.

Appendix C

MR. SCHNADIG: Good morning, your Honor. Richard Schnadig, S-c-h-n-a-d-i-g, on behalf of Avon.

Good morning, your Honor.

THE COURT: Good morning.

Well, I appreciate your coming in. And my reason for asking you to do that before receiving the mandate from the Court of Appeals (at least I haven't seen it yet) is occasioned, I must tell you, by my having read the slip opinion and having some difficulty in recognizing the case as it was submitted to me. So I went back and read my own summary judgment opinion, and my sense of the estrangement from the facts was candidly reinforced here.

My good friend Bill Bauer, when he was Chief Judge of the Court of Appeals used to refer to the function of his Court as coming onto the battlefield after the battle is over and shooting the wounded. He was jocular, but I must say that the level of revisionist history and selective presentation that we sometimes get from some quarters there makes that description all too apt.

In this instance the Court takes off on a kind of speculative tack tact that treats Mr. Byrne's unfortunate conduct as somehow itself satisfying the notice requirement of the Family Medical Leave Act. The Court in doing so seizes on the language in the reg that's obviously geared for a wholly different situation, one in which there is a sudden emergency that doesn't allow somebody to give the notice that would otherwise by required before taking off. Indeed, the sentence

that follows the italicized part immediately I think confirms that quite expressly.

More disturbingly, what is conspicuously absent from the opinion — conspicuous at least maybe to me and the litigants, although I suppose the casual reader could never figure out just what it was that made me go astray as far as I did — is the fact that when Mr. Byrne left the Avon plant earlier in the morning when the supervisory personnel had come to meet with him to discuss the prolonged reading and sleeping that had been shown in the video, his immediate superior, this fellow Sparks, had called both of Mr. Byrne's sisters. Each time he asked whether his sister had noticed Mr. Byrne being strange. Each sister responded by saying "No." And then when Mr. Sparks succeeded in reaching Mr. Byrne asking him what was wrong, "If he had a fever?" Byrne repeated, "Fever, fever," and didn't show up for what been stressed to him as an important meeting at the plant.

As I say, the slip opinion is entirely silent as to all of that. Instead it kind of makes a factual finding that Avon should have known of the prospect that Byrne was, as they put it, "powerless to communicate his condition effectively."

Well, ordinarily those of us who labor as I do in the federal vineyards and who have been subjected to this kind of judicial activism and selective reading of the record that accompanies it don't have a choice. But I have a different position. My senior status brings a statutory provision into play that is not susceptible to creative reading. I am talking about Section 294(b), which says that I can do whatever I want in terms of keeping or not keeping cases.